In order to promote a complete transition from analog to digital television by the year 2006, the Federal Communications Commission (FCC) gave each existing analog television station an extra channel to begin transmitting digital signals.[1] As broadcasters undertake this ***mandatory*** transition from analog to digital, questions arise regarding whether current public interest obligations should be expanded to accommodate the change and account for the "gift" of "free" airwaves. However, while stations did receive the extra channel at no cost, the required facilities that broadcasters must build to be capable of transmitting the necessary digital signals are enormously expensive.[2]

Supporters of additional requirements note the opportunities that accompany the signal given to broadcasters: dramatic increase in the number of channels; sharpened clarity of images; variety of the type of signals that can be transmitted; greater ability for programming; and increased ability to provide access to more people. In sum, because digital broadcasters have increased opportunities, they should be required to provide additional public interest obligations.

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[1] While the FCC originally mandated broadcasters to made a complete transition to digital by the year 2006, this date was superseded when Congress passed a law permitting analog transmission to continue until 85% of the country has televisions that can receive digital signals. Some predict this could prevent a complete transition to digital until after 2010.

[2] Eric Deggans, St. Petersburg Times, Oct. 31, 1999 at 1F (noting that one broadcaster, WEDU, reports that they expect to spend $10 million updating their facilities for digital broadcasting); *see also* Rocky Swift, Florida Television Stations Ready for 2002 Switch from Analog to Digital, Sun Herald, Mar. 2, 2000 ("Outfitting a local TV station for digital broadcasting can cost between $3 million to $10 million.")

EXISTING UNCERTAINTIES

However, increased revenue for applicable broadcasters is not an absolute. A vice president of a major network stated, "[I]t will take 'a long time' before the digital TV audience is large enough 'to make a difference in the financials of our business.'"[3] Numerous variables contribute to the uncertainties regarding the future benefits and/or burdens from the shift to digital television.

At the top of the list is the issue of cost to consumers. At price tags of "$3,500 or more,"[4] digital televisions are out of reach to many American consumers, "and thus far are not compatible with cable."[5] Additionally, "cable, satellite providers and computer operators – all of which are subject to much less governmental oversight – will be competing with broadcasters in the digital video future."[6] Thus, "[w]hile broadcasters are regulated under a 'public trustee' model, cable and satellite providers are subject to much less government oversight – and computer operators essentially none at all."[7] This disparity could further complicate any potential projected revenues of a broadcaster.

Another variable which frustrates accurate predictions is the current and future availability of digital television programming for those who ***can*** afford digital televisions. While the quality of DTV is reported as exceptional, "[e]ven if

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[3] Peter Lewis, Industry Hopes Price Won't Cloud Picture for Viewers of Futuristic Screens, Seattle Times, Jan. 19, 1999 (quoting Peter Smith, vice president of technology with NBC).

[4] Christopher Stern, FCC Revisits Digital Equity Dilemma, Daily Variety, Dec. 16, 1999, at 5.

[5] Id.; *see also* Lewis, *supra* note 2.

[6] Dick Wiley, Communications Today, Feb. 7, 2000, Vol. 6, No. 23.

[7] Dick Wiley, The Big Picture, Gore Commission Recommendations: Premature?, DV Business, Feb. 8, 1999, Vol. 12, No. 3.

you have [a digital television] there's precious little in the way of live digital broadcasts to watch."[8] With limited broadcasting, the incentive to purchase an expensive digital television is curbed. These reasons help explain why it is not rationally possible at this time to accurately forecast how digital broadcasting will develop or whether the uncertain future of broadcasters will be successful.

Therefore, while digital broadcasting may provide many new ways to benefit the public interest, compelling broadcasters to adhere to mandatory requirements during a costly and questionable transition period is not the best way to accomplish this goal. Rather, it would be more judicious to allow the uncertainties to resolve prior to imposing mandatory regulations.

COLLABORATIVE APPROACH

It is best for all interested parties to collaborate on the ways in which digital television can provide increased public services while creating a voluntary self-regulation proposal. Currently, a public interest requirement is imposed obligating a television broadcasting station "to serve the public interest, convenience, and necessity."[9] Voluntary self-regulation does not involve ending any present regulations of broadcasters' public interest obligations.[10] Rather, it requires a current assessment of technological changes and the addition of further reasonable and desirable regulations.

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[8] Lewis, *supra* note 2.

[9] 47 U.S.C. § 336(d) (1999).

[10] Broadcasters are currently required to meet FCC policed guidelines in exchange for free use of analog airwaves. For example, every week a broadcasting station is required to air three hours of educational children programs. *See* Deggans, *supra* note 2.

If the FCC permits broadcasters to develop reasonable self-regulations which they will voluntarily assume, the broadcasters will feel more strongly committed to the public interest and the regulations they had part in designing. Additionally, broadcasters will be able to provide valuable contributions through their analysis of current standards and input regarding improvements that should be made. The end result will find broadcasters actively involved in the concerns of their community without unnecessary and unwanted government involvement.

As suggested in the recommendations of the Final Report of the Advisory Committee on Public Interest Obligations of Digital Broadcasters (the "Gore Commission" Report), the National Association of Broadcasters (NAB) can act as the representative of the broadcasting industry. The Gore Commission also recommends that the NAB develop and recommend self-regulatory standards to and for the industry. I agree. Additionally, in return for a broadcaster's voluntary self-regulation of industry agreed standards, the FCC should provide economic incentives - such as automatic license renewal upon proof the voluntary standard was adhered to. In this way, the broadcasting industry can police itself during a time of drastic change, absent undue government interference.

REPORTING REQUIREMENTS

Broadcasters have shown a strong desire and willingness to commit to the public interest. However, there may be concern regarding determining and monitoring self-regulation. In order to police self-regulation, the current quarterly reports in which broadcasters are required to account for their non-entertainment programming should be expanded to identify ways in which they are complying

with the voluntary self-regulation standards. The availability of information will encourage broadcasters to fulfill their obligations and will also provide public information to any interested party.

Once digital stations are completely active and in operation for a period of two to five years, a commission can observe the actual revenues of a broadcaster and determine whether increased opportunities are in fact proving lucrative. If this is the case, adjustments can be made and obligations increased. This will prevent broadcasting stations from additional and costly responsibilities prior to realizing any financial benefit from digital television. It will also prevent further financial burdens during a time when the station must spend millions in order to build digital facilities and make the necessary conversions to go digital.

Additionally, because current obligations of analog television stations will remain in effect during the transition stage.[11] Stations must continue to maintain their duty to serve the public interest. This duty includes the requirement that they serve the needs of their community by accomplishing the following: providing programming that addresses local issues;[12] maintaining minimal showings of educational children's programs while limiting the amount of advertising during those programs;[13] providing political candidates with access to

[11] Broadcast stations have a number of current requirements that form the core of their obligation to serve the public interest, convenience, and necessity.

[12] Commission Policy on Programming, 20 Rad. Reg (P & F) 1901, 1913 (1960); Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1461 (1992).

[13] Children's Television Act of 1990, Pub. L. No. 104-437, 104 Stat. 996 (1990) (codified as 47 U.S.C. § 303(a), 303(B) and 394).

public forums;[14] providing closed captioning for the hearing impaired;[15] and providing equal employment opportunities.[16]

The Gore Commission's report, which was formulated after a charge from President Clinton to study and recommend what public interest responsibilities should accompany the broadcaster's receipt of digital television licenses,[17] relies on three basic principles. First, the public should benefit from the change of analog to digital; second, public interest obligation recommendations should be flexible so that they can grow and change with the technology; and finally, information, voluntary self-regulation and providing economic incentives are better than government regulation.[18] My suggestion will satisfy all three criteria.

While there is no denial that additional obligations will be desirable, important, and possible, there is simply no immediate need at this time to mandate government regulations. Voluntary self-regulation will prove far superior during the challenging transition ahead.

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[14] 47 U.S.C. §§ 312 (a)(7) and 315.

[15] Television Decoder Circuitry Act of 1990, Pub. L. No. 104-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §§ 303(u), 330(b); Telecommunications Act of 1996 § 713 (codified at 47 U.S.C. § 613); Report and Order, MM Docket No. 95-176, 12 F.C.C. Rcd. 3272 (1998).

[16] 47 C.F.R. § 73.2081. In Lutheran Church-Missouri Synod v. FCC, __ F.3d __ (D.C. Cir. 1998), the U.S. Court of Appeals struck down the EEO program requirements as unconstitutional. The FCC currently has pending a rulemaking proceeding to consider what EEO requirements may and should service. Notice of Proposed Rule Making in MM Docket No.s 98-204 and 96-16, FCC 98-305 (released Nov. 20, 1998).

[17] Exec. Order No. 13,038, 62 Fed. Reg. 12,065 (March 11, 1997).

[18] The final report was released on December 18, 1998.

CONCLUSION

In conclusion, while the possibility for great advances in broadcasting exists with digital advancements, much is unknown regarding the future of digital television. Although the airwaves that broadcasters received were free of charge, "DTV is by no means a windfall for the industry."[19] Utilizing voluntary self-regulation in conjunction with economic incentives will result in an increased public duty without unduly burdening or alienating broadcasters. Therefore, the FCC should be reluctant to impose any additional public interest obligations on broadcasters. It will be more prudent to allow the broadcasting industry to determine voluntary self-regulated standards regarding an increased public interest obligation during the transition from analog to digital. As appropriately stated in Communications Today:

> [W]e are dealing with a nascent technology and service that still must find its appropriate place in the communications marketplace. The imposition of new and burdensome regulatory requirements at this point, when the success of various digital services is still uncertain, could stifle experimentation and slow the entire implementation of digital technology.[20]

Once digital stations are all active and a determination can be made factually regarding revenue and opportunities, adjustments can be made, if

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[19] Wiley, *supra* at note 6.

[20] Id. "Licensees must endure considerable expense in equipping and operating two stations – analog and digital – over a lengthy period of time, without any assurance of increased audience or advertising revenue." Id.

necessary, for public benefit. In the meantime, the uncertainties ahead, coupled with the myriad of challenges facing broadcasters, render mandatory regulations imprudent and uncalled-for. At this time, the public will clearly be better served by ensuring a smooth transition to digital absent additional mandatory public interest obligations.

I respectfully request consideration of this Comment as one that will ensure the participation and attention of broadcasters during the shift from analog to digital, as well as one that will increase obligations to the public interest as feasible.

Sincerely,

Regina M. Lambert

JENNIFER NILES COFFIN

March 17, 2000

William E. Kennard, Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

RE: Public Interest Obligations of Digital Broadcasters: Free Air Time for Political Candidates

Dear Chairman Kennard:

I am writing in response to the Notice of Inquiry, *In the Matter of Public Interest Obligations of TV Broadcast Licensees*, MM Docket No. 99-360. In particular, I would like to respond to the invitation for comments set forth in paragraph 38. In that paragraph, you report that a majority of the members of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters have suggested that digital television broadcasters should be required by the FCC to provide free air time to national and local candidates. Contrary to the opinions of some, I am convinced that the FCC has the authority to impose such regulations on its broadcast licensees without trampling on either the First Amendment rights or the property rights of the broadcasters. In doing so, the FCC would merely be adding substance to an otherwise nebulous mandate of the Federal Communications Act, which is that in exchange for spectrum rights, broadcast licensees must serve "the public interest." Further, in light of the substantial value of the digital spectrum rights "loaned" to existing licensees, the FCC can legitimately impose these obligations as carefully measured conditions that promote political democracy. Finally, claims by broadcasters that only Congress can impose mandatory public interest obligations represent their maddeningly selective invocation of the non-delegation doctrine, which ultimately serves to paralyze the substantive shaping of the public interest obligation by any branch of the government.

I. The FCC has the authority to impose regulations that require broadcasters to provide free air time to political candidates.

It is clear from the Congressional mandate that the FCC was granted the authority to impose obligations on broadcast licensees in exchange for the free use of spectrum space.[1] Congress long ago deemed the airwaves part of the public domain, and both Congress and the courts have characterized broadcast licensees as "public trustees" who have a fiduciary obligation to serve "the public interest, convenience, and necessity."[2] As the Supreme Court has acknowledged, broadcasters have been "given the privilege of using scarce [spectrum space] as proxies for the entire community." In exchange for this privilege, broadcasters are subject to limitations on their First Amendment freedoms, and to a certain amount of "taking" by the community through the mechanism of the FCC.

Although the FCC has steadfastly avoided precisely defining the term "public interest," it has nevertheless regulated broadcast licensees with the overarching goal of requiring licensees to serve the public interest.[3] For example, in the area of children's programming, the FCC has not hesitated to set forth quantifiable guidelines, which, if followed by the licensee, assure renewal of that portion of the license by the FCC. In addition, Congress and the FCC have established rules that require broadcasters to provide "reasonable access" at the lowest unit cost to

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[1] 47 U.S.C. § 309(k)(1)(A) (1994 & Supp. III 1997) (setting forth license renewal standards for broadcast stations)

[2] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (declaring that the government can require a "licensee to . . . conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves"); *see also* CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) ("A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'") (quoting Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C.Cir. 1966)). And as Judge (later Chief Justice) Burger wrote for the D.C. Circuit, "[A] broadcast license is a public trust subject to termination for breach of duty." *Office of Communication of United Church of Christ*, 359 F.2d at 1003.

[3] *See* Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a, 303b, 394); 47 C.F.R. § 73.671 n.2 (1996) (setting forth guidelines strengthening the requirement that licensees serve the educational and informational needs of children).

candidates for federal public office.[4] These rules and regulations have been necessary to alert broadcasters to exactly what hoops they must jump through before their licenses will be renewed. On the other hand, voluntary guidelines, as suggested by the Advisory Committee, do not fairly alert broadcasters of their obligations, and those who wish to avoid their requirements may easily do so. To require free broadcasting time would merely be a "fleshing out [of] a core responsibility of broadcasters as public trustees"[5] and of our collective conception of the democratic process.

Both of these policy goals can be implemented by the FCC, which was granted authority by Congress to grant and renew licenses only to those broadcasters who serve the public interest by meeting the criterion of presenting candidates to the public. Members of Congress who declare that the FCC may not do so without legislation apparently have forgotten Congressional statements to the contrary.[6] But most fundamentally, because Congress has decided to "loan" substantially larger digital spectrum rights to existing licensees until 2006, it should not wonder that the public—or the FCC—considers increased governmentally subsidized licenses to come with increased burdens.[7] To claim that an FCC mandate would violate the non-delegation doctrine in this instance, but not in many other comparable instances, is nothing more than an effort to paralyze the very agency to which Congress obviously intended to delegate a certain

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[4]*See* 47 U.S.C. §§ 312(a)(7), 315(a)-(b) (1994); 47 C.F.R. §§ 73.1941, .1942, .1944 (1996).

[5]Henry Geller et. al, Petition of Common Cause for Inquiry or Rulemaking to Require Free Time for Political Broadcasts (filed Oct. 21, 1993) (Geller Petition).

[6]*See id.* at 2-3, 17 (quoting S. Rep. No. 92-96, 92d Cong., 1st Sess. 28 (1971)) ("The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, and the FCC should continue to consider the extent to which each licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license.")

[7]*See* Press Release, Media Access Project, *Media Access Project Welcomes FCC Action on Public Interest Obligations of Digital Broadcasters,* Dec. 15, 1999 ("Now that broadcasters have double the spectrum, they should provide at least twice as much service."). The president of Media Access Project, Andrew Jay Schwartzman stated, "The cost of political advertising and the a perception by programming executives that politics doesn't 'sell' has reduced us to a sound-byte electorate. Hopefully the Commission's [NOI] will force broadcasters to re-evaluate their priorities and live up to their obligations to the American people." *Id.*

amount of discretion. If Congress won't define "public interest" to include mandatory air time on public airwaves, and the FCC *can't* because it's Congress's responsibility to do so, then broadcasters and Congress are in a merry state indeed. And it is the public who suffers from this trumped-up political handwringing, the very public whose access to the political process is at issue here.

II. The First Amendment rights of broadcast licensees would not be unconstitutionally restricted.

The Supreme Court has consistently upheld the regulation of broadcasters' speech, basing its decisions on the scarcity rationale articulated in *Red Lion*. It is true that the scarcity rationale articulated in *Red Lion* has been subject to increasing criticism, no doubt due in large part to the massive increase in available outlets for the dissemination of information. Thus, it becomes less tenable to argue that the government may restrict the speech of broadcasters because there are only a few speech outlets to be had. Nevertheless, there are at least two other viable rationales for restricting the speech of broadcasters without running afoul of the First Amendment.

a. A broadcast license can be conceived of as creating a limited public forum.

The first alternative rationale is that the broadcast license creates a limited designated public forum, and that as such it can be subject to legitimate government restraints on speech.[8] Under this rationale, the FCC can point to the "public debate theory" of the First Amendment. And in response to the *laissez-faire* approach to the First Amendment, the FCC can make the thoughtful and well-reasoned argument that given the disproportionate aggregations of power in our market economy, a democratic system must permit the government to "take an active role in promoting free speech values and political deliberation,"[9] and to "'try to ensure political equality.'"[10] Further, the FCC can point to the proposition that the marketplace does not always

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[8] *See* Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 Cal. L. Rev. 1687, 1690 (1997).

[9] *Id.* at 1717 (citing Cass R. Sunstein, Democracy and the Problem of Free Speech 256 (2d ed. 1995))

[10] *Id.* (quoting Sunstein, *supra* note 9 at 256).

function to properly include important political issues or views[11] and, most importantly, that the *market* is not an adequate substitute for the *marketplace of ideas.*

In my view, market efficiency functions by definition to exclude important issues and views, as they may be by their very nature "inefficient." If the First Amendment, which is at its very essence the champion of the democratic ideal of self-governance, were left to market forces, we would likely be left with the irony of a de facto, but market-driven, censorship of the political process. The notion of the First Amendment as a wide-open gate to the vast marketplace of ideas should not used by broadcasters to limit its benefits to the majoritarian and utterly commercial pressures of the market. Indeed, if we could comfortably leave our government to the market, we wouldn't need the First Amendment in the first place. I do not mean to suggest that we can comfortably do the opposite—that is, leave the market to the government—because of course we cannot and do not. However, there must be in some instances a comfortable, fair, and democratic middle ground. In the specific context of broadcasters, the middle ground is that the broadcasters have agreed to be subject to regulation in exchange for the exclusive and designated use of valuable public property in the form of a limited public forum. And if that regulation is in the form of the government's assistance in promoting the free speech rights and political involvement of the citizenry, then the middle ground is even more constitutionally firm.

b. The broadcast license can be conceived as a quid pro quo arrangement.

The concept of an exchange leads to the second rationale for imposing regulations that may restrict the speech of broadcasters, the quid pro quo rationale.[12] Broadcasters get free spectrum space; in exchange, the government imposes regulations on the broadcasters as public fiduciaries. This is not to say that under the quid pro quo rationale, the government has an

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[11] *Id.*

[12] *Id.* at 1729-33. Logan persuasively argues that it is the *preferred position* of the broadcasters, as compared with newspaper publishers for example, that justifies the reduced First Amendment protection afforded broadcasters: "It is not scarcity that is the distinguishing factor, rather it is the subsidy of broadcaster speech that has taken place in the government's allocation of scarce spectrum rights." *Id.* at 1730.

unlimited right to restrict or regulate the speech of broadcasters. The regulation must be reasonable and viewpoint neutral, and above all, must allow the broadcaster to retain its discretion.[13] To require broadcasters to give twenty minutes of free air time during a limited period before an election, in my view, would not be an outrageous incursion into broadcasters' space, but would instead be an example of democracy at its finest. Because the both broadcasters and the public have legitimate concerns about journalistic discretion, the broadcaster of course would be permitted to determine the format of the presentations, the time of the presentations, and which race to follow. But as public trustees, the broadcaster would also be required to provide the public with free, open, and uninhibited commentary and debate from the candidates themselves.

Some commentators dispute the quid pro quo rationale, claiming that the free grant of digital broadcast spectrum is "by no means a windfall."[14] According to this argument, licensees must spend money to equip their new digital stations, as well as keep their analog stations up and running. However superficially appealing this argument may be, it ignores the fact that while broadcasters may have to "endure considerable expense" to operate their digital stations, one thing they don't have to pay for is a multimillion-dollar broadcasting license. The appeal of this argument can be even further discredited when one notes the alacrity with which the broadcast industry resists proposals that they pay for their spectrum rights, being "quick to cloak themselves in their public trustee robes whenever they need something from Congress–be it free spectrum for digital, or the 'must-carry' rule that Congress adopted."[15] Again, the argument that

[13]*See generally id.* I am sensitive to the need for broadcaster discretion, and only argue that the broadcasters be required to provide time to political candidates, without condition on the content or viewpoint or presentation.

[14]*See, e.g.*, Dick Wiley, *Public Interest Obligations for DTV Licensees: Proceed with Caution,* Communications Today, Feb. 7, 2000.

[15]Paul Taylor, *Superhighway Robbery: America's Broadcasters v. the Public Good,* The New Republic (May 5, 1997), at 20. And as Henry Geller has noted, calling the turnabout a "new definition of chutzpah," "[b]roadcasters themselves vigorously opposed spectrum usage fees or spectrum auctions specifically on the ground that they have public service obligation and therefore cannot act like the usual business simply to maximize profits." Geller et. al, *supra* note 5 at 2 & n.4 (citing Broadcasting Magazine, April 19, 1993, at 64).

the broadcasters need less regulation in order to compete fairly with other information providers subordinates our political process to the increasingly consumption-driven forces of the body politic.[16]

III. Requiring broadcasters to provide free air time would not be an unconstitutional "taking" under the Fifth Amendment.

The general hue and cry over this issue has been that if the government requires free air time, it would in effect be "taking" many billions of dollars worth of air time from broadcasters without just compensation. This argument strains credulity. First, it is hard to swallow the notion that broadcasters have any greater property right than what they were granted in the first place, which was a license burdened with public interest obligations. Because broadcasters have gotten no more than that, if the government imposes public interest obligations, it "takes" nothing. The government is simply exercising the condition that originally burdened the license (and presumably lowered its value). And despite the theoretical discount in value created by the attached obligations, the burdened license is extremely valuable. Although it may be difficult to measure, the estimated marketplace value of the licenses granted to broadcasters falls somewhere between $11.5 and $132 billion.[17] Furthermore, the total value of digital set-asides that have already been granted to existing licensees has been estimated to be between $11 and $70 billion.[18] Thus, the combined value of these licenses approaches $210 billion (and they do exist

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[16]"When it comes to news coverage, 'serious news is out, the exotic is in–the scandal, personal peccadillo stories, crime, minor things that don't reflect the public interest." Kathy Chen, *Issue of TV Air Time for Public Affairs Is Raised Anew: Regulators Weigh How to Expand Standards for Digital Broadcasting*, Wall St. J. (Dec. 15, 1999), at B4. Cable and satellite TV "has put pressure on broadcasters to 'pander to the lower-common-denominator taste' as a way to hold onto market share." *Id.*

[17]*See* Logan, *supra* note 8 at 1727 & n.235 (citing an FCC staff study; Nat'l Telecomm. & Info. Admin., U.S. Dep't of Commerce, U.S. Spectrum Management Policy: Agenda for the Future (NTIA Special Pub. No. 91-23, Feb. 1991); Christopher Stern, *HDTV Spectrum May Be Auction Target*, Broadcasting & Cable, Mar. 27, 1995, at 9)

[18]*See id.*; *see also* Taylor, *supra* note 15.

in combination, at least until 2006). According to the National Association of Broadcasters, broadcasters boast that they "provided $148 million in free air time to politicians in the last general election in 1996."[19] The simplest math suggests to me that broadcasters are coming away from this deal with a subsidy of tens of billions of dollars, even considering the free air time so generously donated.

Second, broadcasters wildly profit from the use of their free spectrum rights, with the means to those profits being provided by the public. Thus, the requirement of free air time for candidates could be viewed as simply a return on the public's investment in broadcasting via the subsidy. According to industry estimates, "candidates spent $500 million in paid political spots on television in 1995 and 1996."[20] In light of the fact that the figure represents "less than 1 percent of gross advertising revenues over that two-year period," broadcasters can certainly afford the outlay.[21] Broadcasters' dire warnings of "Big Brother" are disingenuous. Because broadcasters "made a social compact with big brother–and through him, with the American public–sixty three years ago," they should now be required to live up to their end of the bargain[22] and even pay out a dividend in the process.

IV. Conclusion

Due to the special relationship between broadcast licensees and the government, it is fair, legal, and necessary that the FCC take this opportunity to establish and enforce an obligation on the part of broadcasters to provide free air time to political candidates. In doing so, the FCC can rely on established First Amendment jurisprudence to avoid constitutional challenges based upon

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[19]Chen, *supra* note 16, at B4.

[20]Taylor, *supra* note 15.

[21]"That's a small fortune in politics, but it's small change to the industry . . . ." *Id.*

[22]*Id.*

free speech. With respect to the Fifth Amendment argument, the FCC can remind the broadcasting industry of the deal it struck many years ago, and of the considerable public subsidy it continues to receive with the digital set-asides. Finally, it might be argued that broadcasters as fiduciaries owe the public a fair return on its investment and should not be permitted to choke the administrative process only after they have reaped the benefits.

I do not doubt that the details of a free air time obligation would be better hashed out by those most intimate with the industry, and I know that there have been workable proposals brought to the FCC's attention.[23] My comments have been aimed more at adding my opinion to the fray, an opinion backed in part by authority and in part by an urgent sense that we are dangerously near accepting the application of market-based standards to our very political process. As a citizen, I object. For these reasons, I urge the FCC to reject those standards and take a firm stance against industry pressures, refusing to yield to the demands of the market. In requiring public trustees to yield instead to the demands of democracy, the FCC will help place this democratic nation in the company of other democratic nations who have already taken this step.

Sincerely yours,

Jennifer Niles Coffin
Third-year Student
University of Tennessee College of Law
1505 W. Cumberland Ave.
Knoxville, TN 37996

cc: Glenn Harlan Reynolds

[23] *See* Geller Petition, *supra* note 5 .

To: FCC
From: Chris Wimberly
Re: DTV Comment
Date: March 17, 2000

My name is Chris Wimberly, and I am an Administrative Law student at the University of Tennessee Law School. This comment addresses two issues. The first issue is whether the Federal Communications Commission's public interest requirements should change or remain the same during the transition from analog television to digital television. The second issue is whether the increased costs of digital television equipment will allow such public interest material to reach the general public after the complete transition to digital television.

I. Public Interest Requirements During the Transition from Analog to Digital Television

Notice of Inquiry 65 FR 4211 could not have been more correct when it stated that "[t]elevision is the primary source of news and information to Americans." Television not only provides the majority of Americans with 60 second analyses of important local and world events, but also tells Americans what to wear, what to eat, what to look like, and who to be like. Television is much more popular and powerful than other media forms such as radio and printed matter because television consists of visual images whose primary purpose is entertainment. This entertainment form necessarily affects the type of content and information that television provides to most Americans. Therefore, since the transition from analog to digital television entails a shift to an even more entertainment based form of television, care must be taken to craft public interest

requirements that will be effective in the age of digital entertainment technology.

The transition from analog television to digital television and high definition television will eventually result in the complete replacement of one entertainment based form of media with an even more entertainment based form of media. Digital television (DTV) and high definition television (HDTV) are advanced forms of television that have been described as " watching a moving photograph, with a clarity and level of detail more akin to looking out the window than watching TV." Both DTV and HDTV have also been described as "delivering a big, bright, and absolutely stunning picture." Suzanne Kantra Kirschner, *HDTV Comes Home*, Popular Science, Fall 1999, at 96. Descriptions such as these suggest that the main effect of DTV will be to increase the quality of the visual imagery of television and therefore increase the entertainment value of television. Since the transition involves a shift from one entertainment based form of media to an even more entertainment based form of media, the Federal Communication Commission's public interest requirements must be reconsidered during the transition in order that they begin to adapt to the environments of DTV and HDTV.

In concluding that public interest requirements need to be reconsidered when one form of entertainment based media shifts to an even more entertainment based form of media, it was helpful to compare the present day analog to DTV shift to the original radio to TV media shift. At first glance, these two media transitions may seem to have very little in common. However, they are actually quite similar because both transitions deal

with a change in the media source from which most Americans obtain their information. The effect of the change from radio to television was substantial. Pre-television radio was well suited to provide important information about complex subjects. But when television appeared, more Americans began to obtain their information from television because of its increased entertainment potential and visual imagery. The entertainment aspect of TV attracted a larger audience and the overall result of this was that television became more concerned about entertainment and less concerned about providing detailed information to Americans. The shift from analog television to DTV is similar to the shift from radio to television in that it is a transition from the major source where most Americans get their information (analog TV) to a more entertainment based source where most Americans will get their information (DTV). However, the shift from analog TV to DTV has the unique opportunity to lay a foundation of enhanced public interest programming during its transition period. If more attention was paid to public interest programming in the transition period between radio and television, then possibly the entertainment aspect of television would not so grossly outweigh the other aspects of television. Therefore, it is important to stress public interest programming during the transition from analog TV to DTV so that the entertainment aspect of DTV does not totally encompass the airwaves.

II. Increased Costs of DTV

The transition from analog TV to DTV and HDTV is unique in that the new media

form will completely supplant the old analog media form. This type of transition is different from past media transitions such as network TV to cable TV and radio to television because after transitions such as these, a consumer could still use his or her older equipment to get a signal and access information or entertainment. After the transition from radio to television, a consumer could still use his or her radio. After the transition from network to cable TV, a consumer could still use his or her television to obtain network or cable television programming. The transition from analog to DTV and HDTV is different. In order for a consumer to enjoy DTV or HDTV he or she must purchase a special set of equipment. A consumer's old analog equipment cannot be used to access DTV or HDTV.

The fact that consumers cannot automatically access this new media form poses certain problems concerning the public interest requirements that the FCC decides to impose upon DTV and HDTV when it has completely supplanted analog television. The main problem that arises is that DTV and HDTV equipment is considerably more expensive than analog television sets. Consumer will have to pay a large amount of money in order to use DTV because their old analog sets will not be useful anymore. This was a concern of Congress when it enacted the Telecommunications Act 1996. The legislative history of the Telecommunications Act states:

> [t]he Committee is particularly concerned that the consumer equipment necessary to implement digital technology will be too expensive for most consumers. Some observers have estimated, for example, that the cost of a digital converter

> is expected to be in the $400-$500 range, with monthly charges in excess of $4.

Act of Feb. 1, 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat. 56) 75. The $400-$500 estimate given by Congress is likely a low estimate. An article in Popular Science states that:

> [a] DTV ready set costs about twice that of an analog TV ($1,800 for Panasonic's). In most cases, it's a 4-by-3 ratio screen, so it can't display 16-by-9 ratio broadcasts without either cropping the image or using only a portion of the screen. And you have to buy a decoder box costing $1500-$2500 to receive digital signals. That's a lot for satellite-level quality, but only half the cost of an HDTV.

Suzanne Kantra Kirschner, *HDTV Comes Home*, Popular Science, Fall 1999, at 96. The combined prices of a television set, decoder box, and antenna can range from $4,000-$25,000. The television sets alone range from $1,800 up to $22,000. The fact that DTV equipment is much more expensive than analog equipment creates a problem with regard to the FCC's public interest requirements in that the overall effectiveness of public programming will be lessened if the general public cannot access that programming. This problem is unique to the analog/DTV shift because other media shifts throughout history have allowed the consumer to have the option of using his or her older form of media to access information. The transition to DTV does not give consumers that option. The transition to DTV will not even give broadcasters the option of broadcasting with analog equipment after the changeover date has passed. Thus the transition to DTV not only

results in increased costs for consumers, but also results in increased costs for broadcasters who must buy special equipment to survive in a digital world. What about the consumers who cannot afford the increased prices of DTV technology? What about the consumers who prefer analog TV? What about the consumers who prefer black and white TV? What about the smaller broadcasters who cannot compete because they cannot afford digital technology? These are questions that should be considered when a complete replacement of a form of media is contemplated, especially when the new form is considerably more expensive than the old form. I understand that prices are high now because the technology is new. But even if the prices go down in the future, public interest programming after the transition to DTV will not be immediately accessible to the general public because the general public was waiting for prices to go down. Therefore, the cost of DTV and HDTV must be carefully considered so that the general public will have access to the general information, entertainment, and public interest programming provided by DTV.

Conclusion

The transition to DTV entails a media shift from one entertainment source where the majority of Americans obtain their information (analog TV) to an even more entertainment related source (DTV/HDTV) where most Americans will presumably obtain their information. This enhanced entertainment value seems to be the main feature of DTV/HDTV. Aside from features such as multicasting and datacasting, the main

technological advancement of DTV seems to be that the picture looks better. DTV will possess the same entertainment appeal that analog TV did, and as a result, the entertainment aspect of DTV will grossly outweigh the public interest aspect of DTV. This problem of making public interest programming noticeable on DTV should not be approached by tailoring public interest requirements to the new technology DTV has to offer. No one is going to pay more attention to public interest programming just because the picture is a little clearer. The FCC's public interest requirements should instead be reconsidered and implemented during the transition from analog TV to DTV. This transition period presents a unique opportunity to lay a foundation for better public interest programming before everyone has focused all their attention on how much better that explosion looked on DTV. A transition period such as the one during the shift to DTV was not present during the shift from radio to TV. Perhaps revamped public interest requirements implemented early on in the transition will have a beneficial effect down the road.

The transition from analog TV to DTV and HDTV is not just another technological advancement. Advanced television systems such as DTV and HDTV are different from technological advancements in the past because this time the new technology is completely supplanting the old technology. A consumer who has analog TV equipment will not be able to use that equipment once the switch to digital television completely takes place. This was not the case when the media shift from radio to